

A **SAMSURI BAHARUDDIN & ANOR v. BORNEO SAMUDERA
SDN BHD**

COURT OF APPEAL, PUTRAJAYA

ROHANA YUSUF JCA

VERNON ONG LAM KIAT JCA

B HASNAH MOHAMMED HASHIM JCA
[CIVIL APPEAL NO: S-02-1830-10-2014]

14 NOVEMBER 2017

C **CIVIL PROCEDURE:** *Proceedings – Notes of proceedings – Appellants sought notes of proceedings from High Court after filing appeal at Court of Appeal – Discovery that digital recordings were incomplete – Appellants prepared fresh transcripts of available recordings to incorporate missing evidence into notes of proceedings – Whether ought to be allowed at appellate stage – Rules of the Court of Appeal 1994, r. 18(4)*

D At the High Court, the appellants were found liable for inducing shareholders to breach a joint venture agreement. After filing an appeal, the appellants sought from the High Court, the notes of proceedings ('the NOP') of the trial. The High Court forwarded six digital video discs ('DVDs') and upon examining the DVDs, the appellants discovered that there was an empty folder, that there were no recordings for certain trial dates and the examination of two witnesses was not recorded at all. The appellants alerted the High Court but were told that the High Court did not have the recordings due to some technical errors. The appellants then informed the High Court that the NOP did not reflect the key aspect of the evidence given by the
E appellants' witnesses and the exchanges between the trial judge, the witnesses and the counsel. Therefore, the appellants prepared fresh transcripts of the
F available recordings to incorporate the missing evidence into the NOP. The High Court instructed the appellants to obtain the respondent's consent to incorporate the fresh transcripts but the respondent refused to certify and verify them. Consequently, the High Court declined to certify the fresh
G transcripts and to grant a hearing to resolve the matter or to incorporate the fresh transcripts into the NOP. Hence, the present application to include the fresh transcripts ('encl. 11a').

Held (dismissing encl. 11a)

H **Per Rohana Yusuf JCA delivering the judgment of the court:**

(1) Under r. 18(4) of the Rules of the Court of Appeal 1994 ('the Rules'), it was the responsibility of the appellants to adhere to the requirement of filing a complete record of proceedings. The appellants were responsible in ensuring that the filing of the memorandum of appeal was

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- attached with copies of the proceedings at the High Court, including the NOP. When the appellants filed the records of appeal, the appellants did not deem it necessary to check or ensure that the NOP were complete. (paras 10 & 11) A
- (2) If the purpose of the application in encl. 11a was to complement the incomplete notes, which showed that the appellants had obviously failed to comply with r. 18(4) of the Rules, then the appellants ought to have ensured that the notes on all the hearing dates were included. The underlying objective of r. 18(4) of the Rules would not be achieved by acceding to the application in encl. 11a, as the fresh transcripts sought to be inserted were selective transcripts, and they did not represent the full transcripts of the entire proceedings. In fact, it would lead to various conflicts where there would be the appellants' version of the transcripts and the other would be the trial judge's version. Furthermore, the transcripts in encl. 11a were neither certified by the court nor approved by the respondent to ensure its authenticity. (paras 12 & 13) B
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- (3) The appellants had every opportunity in the course of the trial to correct the omission in the NOP since there was a daily review of the NOP prepared by the court's transcribers. Before each day of trial, these notes were issued to the parties. That would be the best time for any issue to be raised on any alleged misreporting since everyone would be fresh in their memories and would be able to remember clearly what had happened during the proceedings. However, the appellants decided not to use that opportunity. Furthermore, the appellants had never raised any issue of misreporting in the submissions before the trial judge. Throughout the proceedings, no objection was raised by the appellant on the conduct of trial by the judge. Instead, the appellants waited until the judgment was delivered to raise the issue of bias only in the appeal. (paras 15 & 17) E
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Bahasa Malaysia Headnotes

Di Mahkamah Tinggi, perayu-perayu didapati bertanggung kerana mendorong pemegang-pemegang saham melanggar satu perjanjian usaha sama. Selepas memfailkan rayuan, perayu-perayu memohon daripada Mahkamah Tinggi, nota-nota prosiding ('NOP') perbicaraan. Mahkamah Tinggi mengemukakan enam cakera video digital ('DVD') dan setelah memeriksa kesemua DVD ini, perayu-perayu mendapati satu fail kosong, tiada rakaman bagi beberapa tarikh perbicaraan dan pemeriksaan dua orang saksi langsung tidak dirakam. Perayu-perayu memaklumkan Mahkamah Tinggi tetapi diberitahu bahawa Mahkamah Tinggi tidak mempunyai rakaman-rakaman ini kerana terdapat beberapa kesilapan teknikal. Perayu-perayu seterusnya memaklumkan Mahkamah Tinggi bahawa NOP tidak mencerminkan aspek utama keterangan yang diberi oleh saksi-saksi perayu G
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A dan komunikasi antara hakim bicara, saksi dan para peguam. Oleh itu, perayu-perayu menyediakan transkrip baharu bagi rakaman sedia ada untuk memasukkan keterangan yang tercicir ke dalam NOP tersebut. Mahkamah Tinggi mengarahkan perayu-perayu mendapatkan kebenaran responden untuk memasukkan transkrip baharu ini tetapi responden enggan
B memperakui dan mengesahkannya. Berikutan itu, Mahkamah Tinggi enggan menentusahkan transkrip baharu ini dan enggan membenarkan perbicaraan untuk menyelesaikan hal perkara tersebut atau memasukkan transkrip baharu ke dalam NOP. Maka timbul rayuan ini untuk memasukkan transkrip baharu ('lampiran 11a').

C **Diputuskan (menolak lampiran 11a)**

Oleh Rohana Yusuf HMR menyampaikan penghakiman mahkamah:

- (1) Bawah k. 18(4) Kaedah-Kaedah Mahkamah Rayuan 1994 ('KKMR'), perayu-perayu bertanggungjawab mematuhi syarat memfailkan rekod prosiding lengkap. Perayu-perayu bertanggungjawab memastikan
D pemfailan memorandum rayuan dilampirkan dengan salinan-salinan prosiding di Mahkamah Tinggi, termasuk NOP. Apabila perayu-perayu memfailkan rekod rayuan, perayu-perayu tidak merasakan penting baginya memeriksa atau memastikan NOP lengkap.
- (2) Jika permohonan dalam lampiran 11a bertujuan melengkapi nota-nota yang tidak lengkap, yang jelas menunjukkan perayu-perayu gagal mematuhi k. 18(4) KKMR, perayu-perayu sepatutnya memastikan nota-nota dalam kesemua tarikh perbicaraan disertakan. Objektif asal k. 18(4) tidak dicapai dengan membenarkan permohonan lampiran 11a kerana transkrip baharu yang hendak dimasukkan adalah transkrip terpilih dan
F tidak mewakili transkrip penuh keseluruhan prosiding. Malah ini mengundang pelbagai konflik iaitu terdapat transkrip versi perayu-perayu dan satu lagi versi hakim bicara. Tambahan lagi, transkrip dalam lampiran 11a tidak ditentusahkan oleh mahkamah mahupun dibenarkan oleh responden untuk memastikan kesahannya.
- (3) Perayu-perayu mempunyai peluang, semasa perbicaraan, untuk
G membetulkan ketinggalan dalam NOP kerana terdapat semakan harian NOP yang disediakan oleh penyalin mahkamah. Setiap hari sebelum perbicaraan, nota-nota ini diberi kepada pihak-pihak. Ini masa terbaik untuk membangkitkan apa-apa isu dakwaan salah laporan kerana masih
H segar dalam ingatan semua orang dan mereka boleh ingat secara jelas apa-apa yang berlaku semasa prosiding. Walau bagaimanapun, perayu-perayu memutuskan untuk tidak merebut peluang ini. Perayu-perayu tidak pernah membangkitkan apa-apa isu salah laporan dalam hujahannya di hadapan hakim bicara. Sepanjang prosiding juga, tiada
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bantahan dikemukakan oleh perayu tentang pengendalian perbicaraan oleh hakim. Sebaliknya, perayu-perayu menunggu hingga penyampaian penghakiman untuk membangkitkan isu berat sebelah semasa rayuan.

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Case(s) referred to:

Juraimi Husin v. PP [1998] 2 CLJ 383 CA (*refd*)

Ladd v. Marshall [1954] 3 All ER 745 (*refd*)

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Lau Foo Sun v. Government of Malaysia [1970] 1 LNS 56 FC (*refd*)

MGG Pillai v. Tan Sri Dato' Vincent Tan Chee Yioun [2002] 3 CLJ 577 FC (*refd*)

Mutual Way Development & Construction Sdn Bhd v. Saiseki (M) Sdn Bhd [2008] 2 CLJ 232 CA (*refd*)

Legislation referred to:

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Rules of the Court of Appeal 1994, rr. 7(1), (3A), 18(4)

Courts of Judicature Act 1964, s. 69(1)

For the appellants - Malik Imtiaz Sarwar, Collin Law & Sherzali Asli; M/s Aklee Chua & Angang

For the respondent - Cyrus Das, Jeyan Marimuttu, Jimmy Chang Yaw Chung; M/s J Marimuttu & Partners

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[Editor's note: *For the High Court judgment, please see Borneo Samudera Sdn Bhd v. Siti Rahfizah Mihalidin & Ors* [2014] 1 LNS 1428 ().]

Reported by Najib Tamby

JUDGMENT

E

Rohana Yusuf JCA:

[1] After a full trial, the learned trial judge in the High Court in Sabah and Sarawak at Tawau, found the defendants liable for inducing the 787 and 66 smallholders to breach a joint venture agreement ("JVA") entered into, on 9 August 1998. Resulting from that finding, the learned trial judge ordered the defendants to pay damages to be assessed.

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[2] The trial took 36 days during which the evidence of 29 witnesses was led. Eleven witnesses for the defendants and 18 witnesses for the plaintiff had testified. The trial ended on 25 June 2014 after which counsel for both parties were directed to submit their submissions on the same day. The submissions were possible as it was the practice of the court to provide the notes of proceedings at the end of each day of hearing. The learned trial judge proceeded to deliver his decision on 30 September 2014. The first defendant did not file any appeal. The other two defendants (the appellants) filed a notice of appeal against the whole of that decision on 8 October 2014.

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[3] After filing the appeal, and on 14 October 2014, the appellants' solicitors wrote to the High Court for the notes of proceedings of the trial. The High Court forwarded six digital video discs ("DVDs") to the appellants' solicitors. The DVDs contained, amongst others, the recordings

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- A of that part of the evidentiary stage during which the appellants and seven other defence witnesses were examined. The appellants were also informed by the High Court that it was unable to give the court recordings for 12 and 13 September 2013, 30 June to 2 July 2014, and 17 to 20 February 2014, due to some technical issues.
- B [4] Upon examining the DVDs, according to the appellants' solicitors, it was discovered that the folder for the recordings for the trial on 6 March 2014 was empty, there were no recordings for the trial on 21, 22, 23 and 24 April 2014 and the examination of two of the witnesses, DW1 and DW11, was not recorded at all.
- C [5] The appellants' solicitors informed the High Court of the abovementioned issues *via* letters dated 11 December 2014 and 24 December 2014. The High Court confirmed that it did not have the recordings due to some technical errors in the recording system. By way of a letter dated 19 June 2015, the appellants' solicitors informed the High Court that it was
- D also discovered that the High Court's notes of proceedings (the "HC NOP") did not in any event, record matters that were contained in the available recordings. In this regard, it was conveyed to the court that:
- E (i) the HC NOP did not reflect the key aspects of the evidence given by the witnesses for the appellants and the exchanges between the learned trial judge, the witnesses and counsel;
- F (ii) the appellants' solicitors had prepared fresh transcripts of the available recordings to incorporate the missing evidence (the "fresh transcripts") into the HC NOP. The fresh transcripts includes the testimonies of DW2 to DW10; and
- (iii) the appellants' solicitors requested the High Court to certify the fresh transcripts so as to enable for the inclusion of the same in a supplementary record of appeal.
- G [6] In response, the High Court instructed the appellants' solicitors to obtain the respondent's consent to incorporate the fresh transcripts before the court would certify the same. The respondent's solicitors however, refused to verify and certify the fresh transcripts. It was contended by the respondent that the fresh transcripts are excerpts of only certain parts of the notes of proceedings and should not be added on into the HC NOP, unless it contains
- H the transcripts of the entire proceedings from the commencement of trial to judgment. As such, the inclusion of the fresh transcript into the HC NOP would not reflect a true record of the proceedings. In that way, the notes of proceedings would remain to be an incomplete record of proceedings. Furthermore, by accepting the fresh transcripts, it would also create
- I discrepancies between the fresh transcripts and the HC NOP. In view of the

respondent's objection and disagreement, the High Court declined to grant a hearing before the Deputy Registrar to resolve the matter or to incorporate the fresh transcript into the HC NOP.

[7] Against the above background, there were four applications by way of notice of motion made before us. Out of the four notices of motion, there was encl. 7a which was an application for leave by the appellants to include a further chronology of events. The chronology of events was made at the request of the respondent. We had allowed this application in encl. 7a as it was not objected to by the respondent. Next was encl. 33a, which was an application to amend the intitulement to encl. 11a. The other was encl. 35a, which was an application for leave to include correspondences between the parties regarding the state of affair of the notes of proceedings during the High Court trial. All these three enclosures were allowed as they were not objected to by the respondent.

[8] The only contentious application was encl. 11a. It was an application by the appellants for leave to file a supplementary record of appeal, to include the fresh transcripts which the appellants contended, had not been recorded by the court's transcriber during the trial at the Tawau High Court. The transcripts were marked as bundle A, B, C in the affidavit in support of encl. 11a.

[9] According to the appellants, the fresh transcripts were missing from the HC NOP. The fresh transcripts contains remarks allegedly made by the learned judge during the cross-examination of the witnesses of the appellants. Learned counsel cited r. 18(4) of the Court of Appeal Rules 1994, to contend that all appeal records must contain a complete record as itemised under r. 18(4) which includes "(b) a copy of the judge's notes of hearing of the cause or matter in which the decision appealed against was given which may be recorded wholly or partly by mechanical means;" Thus an incomplete record will not comply with the requirement of the Rule.

[10] We agreed with learned counsel that a complete transcript is important and necessary to reflect the true state of the proceedings at trial. It certainly forms an integral part of the appellate process. We were rather perplexed by this argument for, was it not the duty of the appellants to adhere to the requirement of r. 18(4) in the first place. Under the rule, it is the responsibility of the appellants to adhere to the requirement of filing a complete record of proceedings. The appellants in this appeal was the party responsible to ensure the filing of the memorandum of appeal attached with copies of the proceedings in the High Court, including the judge's notes of proceedings. The appellants had already filed the requisite memorandum, together with the required attachment as spelled out in r. 18(4) including the notes of proceedings. Having filed the memorandum of appeal, the appellants started to raise the issue that the HC NOP was not complete.

A [11] The notes of proceedings of the trial at the High Court were issued in the course of the trial at the end of the day of hearing. This seems to be the practice of the trial court. When these notes were issued by the court, the appellants had not objected or raised issue that it was not a complete note of proceedings. Even when the appellants filed the records of appeal, the
B appellants did not deem it necessary to check or ensure that the notes filed by them were complete. So when this application in encl. 11a was made, purportedly to ensure complete notes are in the appeal records, it was made by including only that part of the recordings on the cross-examination of the two appellants' witnesses. In particular, it sought to add into the HC NOP,
C recording of the alleged intervention made by the learned trial judge during the trial, so as to support a case of the alleged biasness against the appellants on the part of the learned trial judge, in the conduct of the trial.

[12] In our view, if the purpose of the application in encl. 11a was to complement the incomplete notes, which goes to show that the appellants
D had obviously failed to comply with r. 18(4), then the appellants ought to have ensured that the notes on all the hearing dates were included. Whereas the fresh transcripts as contained in volumes A, B and C sought to be included by the appellants in encl. 11a, only relate to the part of the proceedings of the following dates:

E 05-06 March 2014
07-08 April 2014
14-17 April 2014
07-08 May 2014
F 14-17 May 2014
27-28 May 2014
25-27 June 2014

G [13] Thus, the underlying objective of r. 18(4) , in our view would not be achieved by acceding to the application in encl. 11a, as the fresh transcripts sought to be inserted were selective transcripts, and they do not represent the full transcripts of the entire proceedings. In fact, it would lead to various conflicts where there would be the appellants' version of the transcripts and the other would be the trial judge's version. Furthermore, the transcripts as
H contained in the application in encl. 11a are neither certified by the court nor approved by the respondent's solicitors to ensure its authenticity. Obviously, we on our part, would not be able to verify if they were indeed the true record of proceedings in the High Court trial. The accuracy of the proposed transcripts which was done on selective basis cannot be ensured of their
I accuracy or partiality.

[14] The appellants however had conceded that the application in encl. 11a, was made pursuant to s. 69(1) of the Courts of Judicature Act 1964, and r. 7(1) of the Rules of the Court of Appeal 1994. For this, the appellants would have to satisfy the reasonable diligence test under r. 7(3A) and further test of relevancy and determining influence of the further evidence. It was held by this court in *Mutual Way Development & Construction Sdn Bhd. v. Saiseiki (M) Sdn Bhd* [2008] 2 CLJ 232 that leave to admit new evidence may only be allowed if the application had satisfied the stringent requirement laid down in *Ladd v. Marshall* [1954] 3 All ER 745 as applied by the Federal Court in *Lau Foo Sun v. Government of Malaysia* [1970] 1 LNS 56; [1970] 2 MLJ 70, and codified under r. 7(3A). It is axiomatic that the courts are reluctant to freely admit fresh evidence unless for good and substantial cause.

[15] The appellants had every opportunity in the course of the trial to correct the omission in the HC NOP since there was a daily review of the notes of proceedings which were prepared by the court's transcribers. Before each day of trial, these notes were issued to the parties. That would be the best time for any issue to be raised on any alleged misreporting since everyone would be fresh in their memories and would be able to remember clearly what had happened during the proceedings. The appellants however, decided not to use this opportunity despite the various corrections and amendments that were made to the notes of proceedings before the court in the course of the 36 days of trial. The appellants could have easily raised whatever omission made by the learned trial judge then. Instead, both parties had relied on these notes of proceedings in their submissions before the learned trial judge. The appellants had never raised any issue of misreporting in the submissions before the trial judge. This point of omission in the records was only taken by the appellants after the judgment was delivered. It was taken as a ground of appeal against that judgment.

[16] The appellants now wanted to show that the trial judge was biased against the appellants in the conduct of the trial before him. This alleged ground of bias would have been known by the appellants even before the judgment was delivered, yet the appellants were quite happy to rely on the allegedly incomplete notes at that time. Plainly, the appellants had failed to avail themselves of the opportunity and had therefore failed the first requirement of the 'reasonable diligent test' expounded in the *Ladd v. Marshall* to enable the admission of the fresh transcripts at this stage.

[17] Throughout the proceedings, no objection was raised by the appellants on the conduct of trial by the learned judge, but instead waited until the judgment was delivered to raise the issue of bias only in the appeal. The Federal Court in *MGG Pillai v. Tan Sri Dato' Vincent Tan Chee Yioun* [2002] 3 CLJ 577; [2002] 2 MLJ 673 had this to say on raising a ground of bias.

- A The appellant in that case, continued as a participant at the hearing despite having knowledge of matters that pointed to bias on the part of the respondent. It was held that this had the effect of scuttling the appellants' attempt to raise bias as an issue for judicial review on the ground of waiver. Likewise in the present appeal, the appellants had knowledge of all matters
- B grounding his complaint of bias before judgment was delivered. The appellants had ample time and opportunity to take the appropriate action. They did nothing. They waited until judgment was delivered and that also, it was against them. In the circumstances and following the decision by the Federal Court in *MGG Pillai v. Tan Sri Dato' Vincent Tan Chee Yioun* (*supra*) the doctrine of waiver had firmly militated against the appellants herein.
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- [18] The Court of Appeal in *Juraimi Husin v. PP* [1998] 2 CLJ 383; [1998] 1 MLJ 537 had also made some observations regarding the motion to admit evidence of the trial judge's behaviour during the trial as well as to raise a new ground of appeal. The Court of Appeal found in that case that the record
- D showed that counsel was able to conduct his case throughout the trial. And it would be of utmost importance for the court to act with great care and restraint, when entertaining application to seek to put in issue the conduct of a trial judge. Of course, unless the evidence sought to be adduced shows an attack on the case rather than an attack or interference with witnesses, the court should be very slow in a matter of reception of fresh evidence for the
- E purpose of establishing the deprivation of a fair trial.

- [19] The appeal by the appellants in our view is also a truncated appeal where the first defendant who was the signatory to the alleged contracts with the smallholders, had accepted the judgment of the learned High Court Judge
- F without lodging any appeal.

- [20] Having given our due considerations we are of the view that encl. 11a should not be allowed as it would not assist in making the HC NOP complete. The genuineness and integrity of fresh transcripts cannot be ascertained. The appellants had also failed to adduce the fresh transcripts as
- G new evidence under r. 7(3A) for the reasons we had earlier stated.

On all these reasons, we dismissed the application in encl. 11a with costs.

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